

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-2393

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U.S. DISTRICT COURT
FOR THE SECOND CIRCUIT
NO. 74-2393

SECURITIES AND EXCHANGE COMMISSION
PLAINTIFF APPELLEE

- against -

RESEARCH AUTOMATION CORPORATION
KONSTANTINOS M. TSERPE
BASIL MARTOS
ATHAN HAMOS

DEFENDANT APPELLANT

NO. 72 CIVIL 3513

APPELLANTS BRIEF

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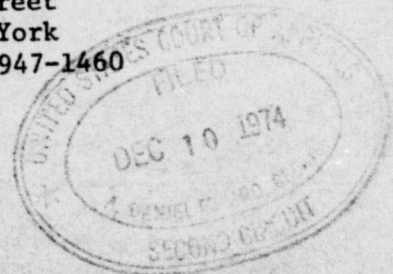


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STATEMENT OF THE ISSUES

Where the Circuit Court of Appeals at a prior appeal, remanded the proceedings to the District Court for further "findings of facts" on the issue of fraud in s proposed Regulation A exemption offering, and where certain difficulties arose between the parties relative to the taking of pre-trial depositions, can the District Court properly strike the answers of some of the defendants and permanently enjoin them from selling stock, without a hearing on the germane issue of fraud?

STATEMENT OF THE CASE

NATURE AND COURSE

On August 17, 1972, the Commission commenced an action for a permanent injunction against the defendants from alleged violations of Section 5 and 17(a) of the Securities Act of 1933, and Section 10(b) of the Securities Act of 1934 and Rule 10b-5 thereunder. The Commission also moved for a preliminary injunction at about the same time. On November 8, 1972, the District Court issued an order for preliminary injunction.

The defendants appealed the order to the Court of Appeals. On March 9, 1973 the Court of Appeals remanded the case to the District Court to make further findings and act as it finds to be warranted under the circumstances.

Thereafter, on October 23, 1973 the District Court issued an order dismissing a complaint as to the alleged violations of Section 5 of the Securities Act of 1933, and vacating the preliminary injunction.

On May 9, 1974 the Commission initiated discovery proceedings by serving notices of depositions on the defendants. Defendants appeared at the Commission office and disputes arose relative to the conduct of the examination. Subsequently, the Commission moved to strike the answer of defendants RAC and Tserpes and for other related relief. Defendants cross moved for relief pursuant to the discovery rules and separately moved to serve a third party complaint against the United States of America.

DISPOSITION BELOW

On August 7, 1974 the District Court entered a preliminary injunction against defendants RAC and Tserpes, and denied defendants' motions for relief pursuant to the rules relative to discovery and for leave to sue the United States of America as a third party defendant. The order granted the Commission's motion for a protective order relative to depositions of three of its counsel.

In effect, the District Court repeated its prior action of November, 1972 in granting the Commission all of the relief which it sought and denying defendants any of the relief which they sought.

FACTS

The germane facts relating to the principal issues in chief are set forth in the written affidavits, memoranda, and objections, of the defendants filed with the District Court in connection with its order of August 7, 1974.

In substance, those facts are that Tserpes appeared on the assigned date for depositions, did not receive a proper receipt for 231 pages of documents delivered, and objected to the instructions of the Commission's attorney Jacobs that a colloquy relative to this matter be deleted from the transcript. Further, during the examination of defendants Hamos, Tserpes and Jacobs argued over the relevance of questions posed by Jacobs (Tserpes affidavit, June 1974 pp.5-6).

Commission's attorneys were served with notices of deposition on May 29, 1974 pursuant to Rule 26 of the FRCP. All documents were pertinent, and material, to the defense of the action, including stenographic records of investigatory interviews of Tserpes and private stockholders of R.A.C. (Tserpes' affidavit June 1974, pp.1-4). The Commission reaction was to move for a protective order and resist defendants' cross motion to tape record the depositions, hold the depositions in the District Court, and limit the examination of defendants Martos and Hamos to questions about stockholder dealings.

On June 24, 1974, defendants moved for leave to sue the United States of America as a third party defendant on the ground that malpractice and other acts of the Commission had injured and damaged the defendants, their reputations, and their civil rights.

All of the issues raised by the motion and cross motion were referred to Honorable Harold J. Raby, United States Magistrate, to hear and report. The reports of the Magistrate totally opposed the position of the defendants and were adopted in their entirety by the District Court.

ARGUMENTS

SUMMARY:

1) Defendants showed good cause and substantial need for taking the depositions of the plaintiff's attorneys Nortman, Bierne, and Jacobs within the meaning of FRCP 26(b)(c) and the doctrine of Hickman v. Taylor.

2) RAC and Tserpes willingly appeared for depositions and were not in violation of Rule 27(d) of the FRCP, thereby upsetting the rationale of the District Court's order striking their answers and issuing a permanent injunction.

3) Defendants are entitled to tape record the oral depositions, at the discretion of the Court, pursuant to FRCP 30(b)(4).

4) The Commission's depositions were not confined to matters within the personal knowledge of the individual defendants, and defendants are entitled to restrict the Commission's inquiries to those matters as provided by Rule 30(d) of the FRCP.

5) Leave to sue the United States of America as a third party defendant for fraud tantamount to malpractice is authorized by Rule 14(a) of the FRCP and the Federal Tort Claims Act, and violations of one's civil rights is actionable under the Civil Rights Act 42 USC 1983.

POINTS

POINT I

The District Court erred in striking the answer of defendants R.A.C. and Tserpes and in entering a permanent injunction against them.

Tserpes, a non-lawyer, appeared at the Commission office for oral deposition and the production of documents at the appointed time and place. The documents were delivered. Then a dispute arose between Jacobs and Tserpes over the wording of the receipt for the documents. The adjournment of the deposition took place at that time. It is well recognized that there can be no default judgment where the party, even counsel, is unfamiliar with Federal procedure. *Dunn v. Pa. R.R.* 96 F.Supp. 597, *Mauer-Heuer, Inc. v. United Packinghouse Workers* 26 FRD. 139. Only where there is total non-compliance are the sanctions under FRCP 37(d) imposed. *Scarlatos v. Kulakundis* 21 FRD 185. The fact is that not only

did Tserpes appear, he produced all of the subpoenaed documents and was willing to answer all questions, given in a non coercive environment, Gill v. Stolow 240 F2d 669, Saltzman v. Burell 156 F. Supp. 538.

POINT 2

The District Court erred in granting the Commission's motion for a protective order respecting the depositions of its attorneys, William Nortman, Thomas R. Beirne, and Mark N. Jacobs, and in denying defendants' motion to compel disclosure of certain documents in the possession of the Commission.

Defendants sought the production of documents obtained and prepared by the noticed attorneys acting in their investigative, as distinguished from their legal authority. These documents were essential to the preparation of an adequate defense of the fraud charges made by the Commission. The documents stemmed from interviews and interrogations of defendants' private stockholders by Commission investigators.

Several of the interview transcripts held by the Commission were of the defendant's Tserpes' personal interrogation. The production of these documents, by the Commission is obligatory under FRCP 26(b)(3).

The documents sought do not constitute the "work product" of Commission lawyers or "mental impressions" properly excluded by Rule 26(b)(3). Indeed, it has been held that the right to evaluate material is a right of the discovering party. So. Ry. v. Tanham 403 F2d 119, Ricket v. L.R. Ryan Inc. 237 F. Supp. 198, Hanger v. Chicago R.I. and Pac. R.R. 216 F2d 501, Tannenbaum v. Walter 16 FRD 570.

As with the documents, defendants sought oral depositions of the noticed attorneys in good faith for good cause, and for concrete and necessary reasons. Examinations of these persons will enable defendants to learn the names of persons possessing material information, documents and data, relative to the issues of patent rights, asset evaluation and alleged misrepresentation or non-disclosure. There are no comparable or substantial alternative means of gaining these facts. There is no intent to "annoy, harass, burden and oppress" the noticed lawyers as proscribed by FRCP 26, nor is the purpose to learn privileged information. Defendants wish the identity and location of persons with knowledge of discoverable matter, in addition to independent facts forming the basis of fraud charges.

The Commission's charges followed the noticed attorneys' investigatory report, presumably based on evaluation of R.A.C.

assets, patent claims, tooling and records. Depositions of the noticed attorneys would reveal to what extent expert opinion was relied on and its source. *Schlagenhauf v. Holdan* 379 USC 104, 117-18, *Southern Ry v. Tanham* Supra 127-131.

The interrogation by defendants will not deal with the recollection and mental impressions of the Commission lawyers, but of official records, not privileged, *Guiford National Bank v. So. Ry* 297 F2d 921, *Mitchell v. Bass* 252 F2d 513, *Burken v. U.S.* 32 FRD 213.

It is strongly urged that the doctrine of *Hickman v. Taylor*, 329 US 495, resting on the principle of liberal discovery, be applied, and recognizing that good cause, relevance and lack of privilege have been demonstrated by defendants.

POINT 3

The District Court erred in denying defendants' motion for permission to tape record the depositions, hold the depositions in the District Court and restrict the scope of oral examination of defendants Martos and Hamos.

It became obvious from the colloquy of the dispute between Jacobs and Tserpes during the depositions of Tserpes and Martos that a serious question was raised as to the completeness of the transcript. FRCP 30(b)(4) authorizes the Court to designate

an alternate manner of recording, preserving and filing the deposition, including provisions to assure accuracy and trustworthiness. It would have been in the interest of fairness and the best traditions of justice if this motion was granted.

FRCP 30(d) authorizes the Court, upon appropriate motion to limit the scope and manner of taking of the depositions in accordance with FRCP 26(c). The latter rule empowers the Court to order "(2) that the discovery may be had only on specified terms and conditions, including a designation of the time and place."

The recited rules encompass two types of specific relief sought by the defendants. The first is to have the depositions held at the Court House where disputes such as have arisen can be resolved by the Court peremptorily. The second is to prohibit the Commission from examining defendants Martos and Hamos on specialized matters of which they have no expertise or knowledge. These two officers and directors of RAC have no knowledge of the technology, patents or marketing activities of the Company, and yet the Commission persisted in delving into these matters with them, injecting negative suggestions of deviousness to which the two were incapable of responding because of their lack

of competence in the matters. These questions should have been directed at Tserpes, who, alone is familiar with the critical facts on those subjects, a point well known to the Commission.

POINT 4

The United States Magistrate erred in denying defendants' request for an interpreter during the oral argument before him on the issues raised in Points 1 through 3 supra.

Rule 43(f) of the FRCP grants a party the right to an interpreter. That right was never made known to the defendants before the oral hearing was held so that they were in no position to produce their own interpreter (Defendant's Objection to Magistrate's Report dated July 2, 1974). It is questionable as to whether the Commission would have consented to a non-neutral interpreter, so vehement was their argument against the defendants' motion for permission to tape record the proceedings (plaintiff's response dated June 21, 1974). By denying the defendants this fundamental right, they were deprived of an opportunity to reply to the Commission's oral arguments. That incident was only one example of the palpable bias displayed by the Magistrate at that time, so it would appear to the objective observer that referring

the issues for a report was only window dressing for a premeditated decision by the Court designed to insulate it from the same charge leveled in the first appeal.

POINT 5

The District Court erred in denying defendants leave to sue the United State of America as a third party defendant.

In the exercise of this administrative duties, the Commission and its staff frustrated and obstructed defendants from proceeding with a public stock offering pursuant to the exemption to registration known as Regulation A. Although admittedly, the Commission has statutory discretion to approve or disapprove an application for exemption, the agency's own rules limit the course of action open to the Commission, It was in the application of those rules and the operational details of "comment letters" and injunction proceedings that the actionable wrongs complained of arose. Even after the facts were obvious to the Commission that the defendants had perpetrated no fraud, nor violated the anti-fraud provisions of the Securities Acts and regulations, it persisted in negligently perpetuating the impediments to defendants' stock offering. That conduct constitutes malpractice within the meaning of the Torts Claim Act.

Matthews v. United States 456 F2d 395, 28 USC 1346(c)

Malpractice is not excluded from the statutory coverage
by the exceptions set forth in 28 USC 2680(a)(h)

Beech v. United States 345 F2d 872, Ingham v. Eastern Air
Lines, Inc. 373 F2d 227, cert. denied 389 & S931.

A review of the numerous documents filed in this action
leaves no room for doubt that the plaintiff can establish
facts to support the allegations in the complaint. Under
such circumstances, leave to sue must be granted. Matthews
v. United States, supra, p.399, Conley v. Gibson 355 US 41.

The acts of the Commission staff in obstructing
defendants' registration from a public offering were not
immune from liability as a discretionary function. Indian
Towing v. US 350 US 61, Rayonier v. U.S. 352 US 315, Somerset
Seeford v. U.S. 193 F2d 631.

Title 42 USC 1983 which bars persons acting under the color
of state law, from depriving another of their constitutional
rights, privileges and immunities, is not exclusively directed
at state officials. Williams v. Rogers 449 F2d 513. The
emphasis on state wrongdoing derives from the history of
civil rights infringement in the southern states. Nevertheless
deprivation of northern states is not excluded from the Act's
ambit. Preventing loss of civil rights on account

of anyone's conduct is the underlying purpose 42 USC 1985.
U.S. ex rel. Moore v. Koelger 457 F2d 892. The Commission's
staff referred to the defendants and private stockholders
as "unsophisticated Greek immigrants" (plaintiff's affidavit
dated August 1972). These appellations encouraged the course
of subsequent administrative action by the Commission to
the detriment of the defendants. Such punitive discrimina-
tion constituted a statutory violation 42 USC 1983.

CONCLUSION

Defendants respectfully request that the following relief be granted:

1. The permanent injunction against defendants R.A.C. and Tserpes be vacated.

2. The answers of defendants R.A.C. and Tserpes be reinstated.

3. Depositions be permitted of plaintiff's attorneys Nortman, Beirne and Jacobs and the Commission be compelled to produce the subpoenaed documents.

4. All depositions be tape recorded and held in the District Court.

5. Oral examination of defendants Martos and Hamos be confined to stock transactions with private stockholders.

6. Leave to sue the United States of America as a third party defendant be granted.